87-2030

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JANET HEROLD,

Petitioner,

vs.

BURLINGTON NORTHERN, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the current practice of remittitur, which has never been sanctioned by this Court as applied in this case, violates a plaintiff's Seventh Amendment right to trial by jury?

PARTIES TO THE PROCEEDINGS BELOW AND SUPREME COURT RULE 28.1 STATEMENT

The caption of the case contains the names of all parties to the proceedings below except for the corporate subsidiaries and affiliates of the respondent, Burlington Northern, Inc., of which petitioner has no knowledge.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Janet Herold, respectfully prays that a writ of certiorari issue to review the important constitutional question raised by the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 2, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 838 F.2d 296 (8th Cir. 1988), and appears in the Appendix at A1 The related case of *Herold v. Burlington Northern, Inc.*, is reported at 761 F.2d 1241 (8th Cir.), *cert. denied*, 474 U.S. 888 (1985). The District Court's memorandum and order granting respondent Burlington Northern, Inc.'s motion for remittitur and the District Court's subsequent rulings recanting its reasons for remittitur also appear in the Appendix at A4, *et seq.*

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 2, 1988. App. at A21. A timely petition for rehearing and rehearing *en banc* was denied on March 15, 1988. App. at A22. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law".

STATEMENT OF THE CASE

Petitioner, Janet Herold, was awarded a jury verdict of $2 million for loss of consortium as a result of horrendous injuries suffered by her husband, Kenneth, in a railroad grade crossing accident in North Dakota on November 21, 1974. The District Court granted respondent Burlington Northern, Inc.'s ("BN") post-trial motion for remittitur and ordered Janet to accept $300,000.00 or undergo a new trial on damages. The District Court based its remittitur on the ground that certain allegedly inadmissible evidence concerning the Herolds' two post-accident children was a major factor in the size of the verdict.

Janet refused to accept the remittitur. A second jury then considered the exact same evidence concerning the two children, but only a fraction of the total evidence considered by the first jury, and returned a verdict of $500,000.00. Janet appealed to the Court of Appeals for the Eighth Circuit to reinstate the original verdict but the court refused, reasoning that even though the District Court erred

in its justification for the original remittitur, its view of the evidence in the first trial took precedence over that of the jury.

This case thus raises important constitutional questions concerning the practice of remittitur in the federal courts. The Seventh Amendment to the United States Constitution preserves the right of trial by jury, but the practice of remittitur, at least as applied to an amount of damages to an injured plaintiff who refuses to accept one, unconstitutionally allows individual judges to substitute personal views for those of an unbiased panel of jurors. This practice of remittitur should, therefore, be abolished.

I. THE ACCIDENT AND INJURIES

As a result of the railroad grade crossing accident involving a BN coal train and the Herolds' cattle truck on November 21, 1974, Kenneth Herold, the husband of Janet Herold, received incredibly severe permanent injuries. They include diffuse brain damage rendering him, in addition, a spastic quadriplegic. The District Court described Kenneth's injuries as follows:

> The uncontroverted evidence established that he suffered extended, generalized brain damage; that he had been reduced to a spastic quadrapelegic [sic]; that his memory for current activities was largely lost; that his memories of his youthful health, activities and associates was retentive; and that his present mental abilities were low average. Thus we have a reflective, perceptive, interpretive man trapped in a [sic] ungovernable, unusable body, with no meaningful ability to escape, even through communication. *A more terrible prison is difficult to visualize.*
> App. at A7 (emphasis added).

Janet, who was a passenger in the truck, was also injured but her damages for loss of consortium resulting from the

effects of Kenneth's injuries were enormous by comparison. Because of her Catholic upbringing and rural North Dakota values, she has stayed with Kenneth throughout their 14-year ordeal and will never leave or divorce him. She made a commitment to Kenneth when they were married in September, 1973 and even though she has had to watch him deteriorate, Janet continues to be devoted and dedicated to his welfare.

II. DISTRICT COURT PROCEEDINGS

After hearing three weeks of evidence and testimony, the jury in the first trial returned a verdict for the Herolds on December 13, 1983. The jury considered all of the evidence concerning Kenneth Herold's injuries as summarized by the District Court, *supra*, and all of the evidence relating to her loss of consortium damages resulting from Kenneth's condition. The jury also heard testimony that after the accident, Janet conceived two children by Kenneth who is able to obtain an erection and with her help consummate the act. The first pregnancy was an attempt to make her post-accident life with Kenneth "as normal as possible". None of this testimony was contradicted by the BN which objected to *no* evidence regarding the children. The jury was completely and properly instructed on all aspects of the applicable law. Moreover, the jury heard only Janet's suggested verdict range because after the close of the evidence, the attorneys for the BN waived final argument to the jury.

The District Court upheld the total verdict except for Janet's $2 million verdict for loss of consortium which it singled out as being "contrary to the great weight of the evidence; and that there is no basis on which the jury could have found that verdict within the framework of the correct law and admissable [sic] evidence." App. at A9-10. Specifically, the District Court concluded that "the drama and the emotional impact of the childrens' conception, birth, care and development under circumstances of a spastic, non-communicating, occasionally violent spouse-father is a

major factor in the size of the verdict for loss of consortium." App. at A9. Based upon its own view of the evidence in this regard, the District Court ordered an 85% remittitur or a new trial. Janet refused the remittitur. She was thus forced to undergo a second jury trial.

Prior to the second trial, BN filed a motion *in limine* seeking to totally exclude evidence of the two children and Janet's problems in raising them in the environment created by Kenneth's condition. The BN recognized that if allegedly improper evidence of the children accounted for 85% of the original verdict, it would be totally inconsistent for the District Court to admit such evidence at the second trial. The District Court, however, denied the BN's motion and conceded that contrary to the reasoning set forth in its original order of remittitur, evidence of the children was relevant, admissible and "useful" to a jury in making a fair decision. App. at A20. Because the District Court recanted and reversed the reasons for its remittitur and thus admitted that the original $2 million verdict was *not* based upon inadmissible evidence, Janet filed a pretrial motion to reinstate the original verdict. The motion was denied, App. at A19, and a second trial commenced on January 5, 1987.

The second jury actually heard more evidence pertaining to the difficulties Janet had in rearing their children in the face of uncontrollable and unacceptable behavior toward Janet and the children by Kenneth than the first and again the BN made no objection thereto. But the District Court also permitted the BN to suggest to the jury that Janet did not "need" a verdict for her own independent right of loss of consortium because Kenneth's judgment had been recently satisfied and she could utilize his award for her purposes. The second jury was also prevented from hearing much of the relevant evidence introduced at the first trial concerning the devastating nature of Kenneth's injuries and their effect upon Janet's life. Janet was, therefore, stripped of the original jury verdict which was indeed based upon the correct law and admissible evidence and was instead forced to relitigate her claim under artificial circumstances which

could only confuse and mislead the second jury. Only the first jury heard all of the evidence on damages and was able to make an informed allocation thereof.

III. COURT OF APPEALS' DECISIONS

After the first trial, Janet cross-appealed to the Court of Appeals for the Eighth Circuit which held that the order of remittitur was interlocutory and not appealable at that time. *Herold v. Burlington Northern, Inc., supra* at 1249-50. On appeal after the second trial, the Court recognized that the District Court had recanted its reasons for the remittitur and had, in fact, been mistaken when it concluded that evidence of the birth and care of the children was inadmissible. App. at A3. Nevertheless, the Court of Appeals affirmed the remittitur despite the fact that there was no justification for it other than the District Court's original personal disagreement with the amount of the first verdict.

Janet filed a timely petition for rehearing and rehearing *en banc*, arguing that the District Court's admittedly erroneous remittitur and the Court of Appeals' acquiescence in that error deprived Janet of her Seventh Amendment right to trial by jury. The Court of Appeals denied the petition on March 15, 1988 and this petition for writ of certiorari follows in a timely fashion.

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS NEVER SANCTIONED THE PRACTICE OF REMITTITUR AS APPLIED IN THIS CASE

Although the practice of remittitur has long been passively accepted by this Court and has "been many times reiterated" and "uniformly applied by the lower federal courts",[1] it does not appear that the practice, *as applied in this case,*

[1] *Dimick v. Schiedt*, 293 U.S. 474, 483 (1935).

has ever been given specific constitutional credence or approval. In *Dimick v. Schiedt*, 293 U.S. 474 (1935), a case involving the issue of additur, this Court held, in *dicta*, that because the practice of remittitur had been around for "more than a hundred years", it probably would "not be reconsidered or disturbed at this late day". *Id.* at 484-85.

There is not now and never has been, however, a *reasoned* decision to support the practice, as it was applied by the lower courts in this case. There is no justification in our system of jurisprudence for a practice which allows a single trial judge, "in the cloistered atmosphere of his chambers"[2] to substitute his own judgment for that of "a jury of twelve conscientious citizens".[3] It is, therefore, both appropriate and timely for this Court to abolish the *practice* of remittitur which has been so amorphously and uncritically developed, in favor of the constitutional *right* to trial by jury which "is enshrined in the Bill of Rights and sanctified by centuries of history".[4]

Whereas the origins of the right to trial by jury are well documented and preserved in the Seventh Amendment,[5] the practice of remittitur seems to have sprung from the ancient common law without any critical examination as to its effect

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[2] *Swanson v. Hill*, 166 F. Supp. 296, 300 (D.C. N.D. 1958).

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[3] *Id.*

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[4] *Dace v. ACF Industries, Inc.*, 722 F.2d 374, 377 (8th Cir. 1983).

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[5] For example, as stated by this Court in *Dimick, supra*, note 1, at 485:

> The right of trial by jury is of ancient origin, characterized by Blackstone as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy".

on the constitutional right of trial by jury.[6] In the early case of *Blunt v. Little*, 3 Mason 102 (1822), the jury returned a verdict for $2,000.00 in a malicious prosecution action. Defendant moved for a new trial on the ground of excessive damages and the court ordered a new trial unless plaintiff agreed to reduce the verdict by $500.00. The plaintiff agreed and the defendant's request for a new trial was refused. The case did not address the issue of whether such a practice violated either parties' Seventh Amendment right to trial by jury and "no authority whatever" is cited in support of the court's action.[7]

In *Northern Pacific Railroad Co. v. Herbert*, 116 U.S. 642 (1886), the jury awarded plaintiff $25,000.00 for an amputated leg. The court ordered that defendant be given a new trial unless plaintiff accepted $10,000.00. The plaintiff agreed and judgment was entered in his favor. The defendant appealed to this Court, arguing that the plaintiff should not have been given the opportunity to preclude its right to a new trial by agreeing to a remittitur. In ruling on the matter, Justice Field cited the *Blunt* case and did no more than conclude: "the exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the

[6]*See, e.g.*, Fleming, *Remedies for Excessiveness or Inadequacy of Verdicts*, 1 DuQ. L. Rev. 143 (1963); Carlin, *Remittiturs and Additurs*, 49 W.Va.L.Q. 1 (1942); Note, 21 Va.L.Rev. 672 (1935).

In *Dimick, supra*, note 1, at 483, this Court indicated that the practice of remittitur had been condemned as opposed to the principles of the common law by every reasoned English decision and that no case prior to *Dimick* had ever attempted to ascertain the common law rule on the subject.

[7]This observation regarding the lack of authority for Justice Story's ruling in *Blunt*, was made by this Court in *Dimick, supra*, note 1, at 483, to illustrate the illusory manner in which the practice of remittitur was developed and why its evolution is so inexplicable.

amount awarded by the verdict was a matter within the discretion of the court".[8] *Id.* at 646-47.

It is apparent that the *defendant* in the *Herbert* case argued that its right to a new jury trial was denied because the court allowed the plaintiff the option of accepting a reduced recovery. The plaintiff's choice of accepting the reduced amount prevented the defendant from having an entirely new trial. In rejecting defendant's position, this court did not discuss the genesis of the power to remit the verdict, but simply held that the "corrected" verdict could be properly "allowed to stand" despite the defendant's request for a new trial.[9] It is critical to recognize, therefore, that the remittitur practice permitted and accepted by this Court in *Herbert* was not the same as that imposed by the courts in this case where, rather than defendant being deprived of a new trial, the *plaintiff* was deprived of an actual jury verdict which was admittedly based on the correct law and admissible evidence.

This critical distinction was emphasized by this Court in *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889). In that case, a jury verdict of $39,958.33 for conversion of plaintiff's cattle was remitted to $17,125.00 after plaintiff agreed to the remittitur in order to avoid a new trial for defendant. Defendant appealed to this Court arguing that his constitutional right to have the question of damages tried by a jury in a new trial was abridged by the plaintiff's acceptance of a lesser amount. In rejecting defendant's argument, this Court cited *Herbert* and noted that "to require a plaintiff to submit to a new trial, unless,

[8]The court in *Dimick* noted that Justice Field's opinion does not even refer to the common law and the state cases which he cites are equally silent in respect of the common law rule. *Id.* at 484. The fact that Justice Field did "no more" than come to a mere conclusion regarding remittiturs is again testimony to the fact that the practice has been passively accepted without constitutional analysis.

[9]*Herbert*, 116 U.S. at 646-47.

by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give *him* any cause for complaint". *Id.* at 73 (emphasis in original). Whether the court decides to entirely set aside a verdict or allow it to stand after being reduced are matters for the court's discretion "and cannot be reviewed at the instance of the party in whose favor the reduction was made". *Id.*

The court in *Mann*, therefore, confined its ruling to the situation where a *defendant* attempts to challenge a remittitur because the plaintiff's acceptance of the reduced amount precludes the defendant from having a new jury trial. This court did *not*, however, sanction the practice of remittitur where the plaintiff, in order to avoid a new trial, is forced to accept an amount which is less than the jury's verdict and which only the trial court has decided to award. In fact, the Court in *Mann* specifically reserved the determination of that issue for another day:

> Under what circumstances, if any, a party who is compelled to remit a part of the verdict, in order to prevent a new trial, can complain before this Court, we need not decide in the present case.

Id. at 73. There can be no question, therefore, that from *Blunt* in 1822 until *Mann* in 1889, this Court did not decide the issue of whether remittiturs are constitutional in cases such as the one at bar. In the cases decided after *Mann*, this Court did not attempt to distinguish between remittiturs as applied to defendants or plaintiffs. On the contrary, the court continued to accept the practice of remittitur without question and without a critical examination of its constitutional implications in a situation such as that presented here.[10] *See e.g., Koenigsberger v. Richmond Silver Mining*

[10]The court in *Dimick* cited several cases for the proposition that the practice of remittitur had been "many times reiterated" since *Herbert*. The court, however, also noted that "it is, however, remarkable that in none of these cases was there any real attempt to ascertain the common law rule on the subject". *Id.* at 483.

Co., 158 U.S. 41 (1894); *German Alliance Ins. Co. v. Hale*, 219 U.S. 307 (1910); *Gila Valley, GNN Railroad Co. v. Hall*, 232 U.S. 94 (1913); *Cf. Kennon v. Gilmer*, 131 U.S. 22 (1889).

Finally, in *Dimick v. Schiedt, supra*, this Court reviewed past cases on the subject of remittitur and concluded that "in the last analysis", the practice was both suspect and ill-defined:

> ... the sole support for the decisions of this Court and that of Mr. Justice Story [in *Blunt*], ... must rest upon the practice of some of the English judges—a practice which has been condemned as opposed to the principles of the common law by every *reasoned* English decision, both before and after the adoption of the federal Constitution, which we have been able to find.
>
> In the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise.

Id. at 484 (emphasis in original). When the court made this statement, however, it had to have been referring to the practice of remittitur as applied in cases such as *Mann, supra*, where the defendant's right to a new trial was precluded by the plaintiff's voluntary acceptance of a reduced verdict. Up until this case, it appears that this Court has not had the opportunity to specifically rule on the issue left to be determined by the Court in *Mann*.[11] As

[11] Although it does not appear that this Court has ruled on the specific issue presented here, remittiturs have recently found disfavor in the state courts and at least one state supreme court has entirely abolished the practice of remittitur as being in violation of a party's right to trial by jur. *See Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99 (Mo. 1985). *But see* H.B. 700, 84th Gen. Assembly, 1987 Mo. laws _____ (re-establishes right of trial court to impose remittitur in cause of action after July 1, 1987); *Glass Design Imports, Inc. v. Rastal*, 672 F. Supp. 419 (D.C. Mo. 1987) (remittitur is still available in Missouri federal courts).

stated below, the facts of this case show precisely why a remittitur which reduces a jury's verdict for no apparent reason is in violation of the plaintiff's Seventh Amendment right to trial by jury and, therefore, why the practice of remittitur, as applied in this case, should be entirely abolished or substantially revised.

II. THE PRACTICE OF REMITTITUR, AS APPLIED IN THIS CASE, SHOULD BE ENTIRELY ABOLISHED

As recognized by this Court in *Arkansas Valley Land & Cattle Co. v. Mann*, *supra*, the practice which prevents the defendant from having a new trial after a plaintiff voluntarily accepts a remittitur, cannot give the defendant any cause for complaint because the reduction is always made in defendant's favor. The same is obviously not true with respect to a plaintiff who is forced or compelled to remit all or part of a verdict in order to prevent a new trial for the defendant. In such a case, the plaintiff is deprived of the constitutional right of trial by jury by virtue of the trial court's unfettered interference with what an unbiased jury has already decided. Whereas the practice of remittitur always benefits the defendant, it always forces the plaintiff to gamble away his or her constitutional right to a jury trial.

The facts and circumstances of this case provide the court with the perfect example of how the current practice of remittitur violates a plaintiff's Seventh Amendment right to trial by jury and why the practice should, therefore, be entirely abolished. The original $2 million verdict awarded to Janet Herold was based upon the correct law and admissible evidence. The evidence regarding the loss of consortium issue was uncontradicted. The BN did not object to *any* of the evidence or testimony concerning the Herolds' two children. The jury was properly and completely instructed on the law. The BN waived final argument to the jury. Based upon the correct law as given by the District Court and admissible evidence which was not challenged by the BN, the jury exercised its charge in making its award.

Nevertheless, the District Court reasoned that evidence of the birth, care and development of the Herolds' two children in the context of Kenneth's injuries was a "major factor in the size" of the verdict. App. at A9. The court also concluded that the jury's verdict was not supported by the "correct law and admissable [sic] evidence". App. at A10. Before the second trial, however, the district court reversed its position and concluded that evidence of the birth, care and development of the two children was indeed relevant and admissible and that such evidence was *necessary* and useful for the jury to make a fair decision. App. at A20. It is also undisputed that the first jury was properly instructed on the law.[12] If the original verdict was, therefore, now admittedly based on admissible evidence and the correct law, even the reason for the District Court's remittitur, being its own personal opinion that the verdict was "contrary to the great weight of the evidence", App. at A9, and, therefore, too large is in error.

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[12]It must be presumed that a jury has followed the proper instructions of the court in reaching its determination. *Powers v. Martinson*, 313 N.W.2d 720 (N.D. 1981).

The practice of remittitur was thus utilized by the District Court as an indiscriminate and unfettered means by which to substitute its own views on community standards for those of an impartial jury. In doing so, the District Court violated Janet's constitutional right to trial by jury. It is not the prerogative of a district court to take a verdict which is supported by the law and the evidence and reduce it merely because the court has a different idea as to what the damages should be.[13] The issue of damages in a personal

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[13] "[I]t is an illogical theory to suppose that a trial judge in the cloistered atmosphere of his chambers can, by some legal legerdemain better determine the precise amounts to be awarded litigants than a jury of twelve conscientious citizens". *Swanson v. Hill*, 166 F. Supp. 296, 300 (D.C. N.D. 1958).

Ironically, the Eighth Circuit Court of Appeals has consistently and jealously guarded the role of juries when it comes to assessing damages. *See Dace v. ACF Industries, Inc.*, 722 F.2d 374 (8th Cir. 1983):

> Occasionally, verdicts may be returned with which judges strongly disagree. This is a price, we think, worth paying for the jury system, which is enshrined in the Bill of Rights and sanctified by centuries of history. When questions of fact are involved, common sense is usually more important than technical knowledge, and twelve heads are better than one.

Id. at 377: *Taken Alive v. Litzau*, 551 F.2d 196 (8th Cir. 1977):

> [W]e must accept substantial disparaties among juries as to what constitutes adequate compensation ... This is a litigious fact of life of which counsel, clients and insurance carriers are fully aware. Once they place their fate in the hands of a jury, then they should be prepared for the result, whether the award be considered generously high or penuriously low. They cannot expect the court to extricate them in all cases where the award is higher or lower than hoped for or anticipated.

Id. at 198. *See also Ashcroft v. Calder Race Course, Inc.*, 492 So.2d 1309 (Fl. 1986).

injury case such as this is uniquely factual'[14] and this Court has steadfastly protected the jury's function as a fact-finding body.[15] While judges are experts in the law, "the Seventh Amendment prohibits a court from substituting its judgment on a question of fact for that of a jury".[16] Yet that is precisely what happened in this case and it was allowed to occur only because of the unconstitutional practice of remittitur.

It is not enough to say that Janet's right to trial by jury was preserved because she was given the option of refusing remittitur and having a new trial. Because the original jury's verdict was admittedly based upon the correct law and admissible evidence and because the only basis for the District Court's remittitur was its personal disagreement with the amount of the verdict vis-a-vis the weight of the evidence, Janet's choice of either accepting 15% of the original verdict or undergoing the penalty of a new trial was certainly no choice at all. She was provided a fair trial by the original jury, but the District Court forced her to give up her

[14]"It is difficult to conceive of a more subjective task than placing a dollar value on the tragic loss of a human life". *Novak v. Gramm*, 469 F.2d 430, 433 (8th Cir. 1972); "[A]ssessment of damages is within the sound discretion of the jury. Each case is evaluated by a different, randomly selected group of individual jurors". *Vanskike v. Union Pacific Railroad Co.*, 725 F.2d 1146, 1150 (8th Cir. 1984).

[15]In *Dimick, supra* this Court recognized that "The controlling distinction between the power of the court and that of the jury is that the former has the power to determine the law and the latter to determine the facts" and that "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care". *Id.* at 486.

[16]*United States Potash Co. v. McNutt*, 70 F.2d 126, 132 (10th Cir. 1934); *See also Kelly v. Illinois Central Gulf Railroad Co.*, 552 F. Supp. 399, 401 (D.C. Mo. 1982) ("the Seventh Amendment commands the utmost judicial restraint in re-examining any fact tried by a jury").

constitutional rights and undergo a second trial which was an incomplete and sanitized version of the first."[17]

If the right to trial by jury is really assured to injured persons by the Seventh Amendment, trial judges who do not possess the collective experience and judgment of a jury should not be empowered to simply disagree with the amount of a verdict. This practice of remittitur should, therefore, be entirely abolished by this Court.

III. THE PRACTICE OF REMITTITUR SHOULD BE SUBSTANTIALLY REVISED

The unconstitutional nature of the remittitur practice becomes glaringly evident when the standards by which it is to be applied are examined. The amorphous and shifting standards by which trial judges are expected to apply the remittitur rule are the essence of the problem. The Eighth Circuit in this case held that the District Court "did not abuse its discretion" in ordering remittitur. App. at A3. No other explanation is given as to why the District Court's "discretion" should have taken precedence over that of the jury. The Court of Appeals noted that "the trial court had the opportunity to observe the proceedings and the evidence ..." App. at A3. Yet the jury, consisting of six conscientious citizens, had the precise same opportunity and was specifically charged by the District Court with the duty of determining the facts, including the factual issue of damages.

The Court of Appeals also held that "remittitur is approp-

[17] "Whereas the first trial lasted a month and included *all* of the evidence concerning Kenneth Herold's injuries and the manner in which Janet Herold was damaged thereby, the second trial lasted a matter of days and the jury was precluded by the District Court from hearing all of the evidence. Moreover, the jury at the second trial was permitted to hear testimony and argument from the BN that Janet Herold did not "need" a verdict for her own loss of consortium because her husband's verdict had recently been satisfied.

riate only if the award is so grossly excessive as to shock the conscience of the court". App. at A3. Nowhere in the District Court's remittitur order does it say that Janet's verdict for loss of consortium was "grossly excessive" or that it "shock[ed] the conscience of the court". The District Court admitted prior to the second trial that the original jury's verdict was based upon necessary and admissible evidence and it is undisputed that the jury was properly instructed on the law. It is apparent, therefore, that the District Court's remittitur was based upon the unfettered and unbridled discretion to disagree with the jury's assessment of the weight of the evidence. Such a result is only permitted by the current remittitur practice. This case thus provides this Court with an all too common example of how the unstandardized practice of remittitur operates to unconstitutionally preclude the right of trial by jury.

The remittitur practice in the context of a case where "certain identifiable sums"[18] can be deducted from a verdict is not so objectionable as in a case where the jury exercises its discretion and then the trial judge imposes his or her own views on the subject. A case where the court is able to ascertain damages based upon a calculation from the evidence[19] is not so problematic as a case, such as this, where lives have been destroyed. A case where the jury has considered clearly prejudicial evidence or obviously ignored the court's instructions is a more appropriate case to remit than a case where the jury's verdict is admittedly large but based upon unobjectional and rebutted evidence. But yet the practice of remittitur is applied to each such case without distinction and without regard to the constitutional right of trial by jury.

[18] 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2815, at 99 (1973); *Carter v. District of Columbia*, 795 F.2d 116, 134 (D.C. Cir. 1986).

[19] *See Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889).

The problem in this regard stems from the fact that the practice of remittitur was originally condemned by every reasoned English decision as being contrary to the principles of the common law [20] but, nevertheless, typical formulations of the remittitur rule today do not depart very far from those which were used in the eighteenth century.[21] The current practice of remittitur, therefore, is being used in much the same way to indiscriminately reduce the amount of jury verdicts. Such a practice is directly contrary to the constitutional right of trial by jury. As stated by Mr. Chief Justice Rehnquist (dissenting) in the case of *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979):

> To sanction creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment.

Id. at 346. Without suggesting a dilution of our conviction that the remittitur practice, at least in cases where a jury award is arbitrarily taken from the person to whom it was given, is not a violation of the Seventh Amendment, we recognize its widespread usage. The practice of remittitur is currently being used to limit the province of the jury to a far greater degree than permitted at common law and, therefore, if the practice is permitted to continue at all, it must be substantially revised by this Court so as to provide district courts with appropriate standards for its use. Only in this way can the constitutional right of trial by jury be protected and only in this way can unfortunate cases such as this be avoided.

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[20] *Dimick, supra*, 293 U.S. at 484.

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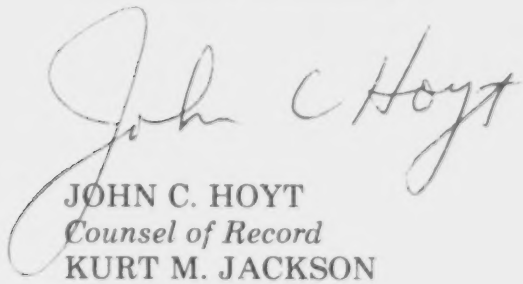
[21] Fleming, *Remedies for Excessiveness or Inadequacy of Verdicts*, 1 DuQ. L. Rev. 143, 146 (1963).

CONCLUSION

For each of the foregoing reasons, the Court should grant this Petition for Certiorari.

DATED this 11th day of June, 1988.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5076

JANET HEROLD, Appellant,	*	Appeal from the
	*	District Court
v.	*	for the
BURLINGTON NORTHERN, INC., a foreign corporation, Appellee.	*	District of North Dakota
	*	

Submitted: January 13, 1988

Filed: February 2, 1988

Before: LAY, Chief Judge, McMILLAN and ARNOLD, Circuit Judges.

PER CURIAM.

On November 21, 1974, Kenneth and Janet Herold were injured when a Burlington Northern train collided with their truck at a railroad crossing outside of Dickinson, North Dakota. Kenneth was severely injured and recovered a substantial jury verdict from Burlington Northern; Kenneth's judgment was affirmed on appeal. *See Herold v. Burlington Northern, Inc.*, 761 F.2d 1241 (8th Cir.), *cert. denied*, 474 U.S. 888 (1985). Janet, who was also injured in the accident, recovered $250,000 for her injuries in addition to receiving a $2,000,000 award for loss of consortium. The district court[1] ordered Janet to accept a remittitur which

[1]The Honorable Bruce M. Van Sickle, United States District Judge for the District of North Dakota.

would reduce the consortium award to $300,000 or to undergo a new trial on the issue of damages for her claim of loss of consortium. The court reasoned that the verdict for loss of consortium was contrary to the weight of the evidence, and found there was no basis on which a jury could have awarded the amount of the verdict in view of the applicable law and admissible evidence. Both parties appealed from the district court's decision in the first trial, and this court held that the order for a new trial or remittitur was interlocutory and not appealable. *Id.* at 1249-50. Janet refused to accept remittitur. A second trial was held on Janet's claim for loss of consortium resulting in a verdict for $500,000. Janet now appeals, claiming that the district court originally erred in granting Burlington Northern a new trial when she refused to accept the remittitur.[2] Janet claims that the original award of $2,000,000 should be reinstated.

In the first trial, the district court found that the "drama and the emotional impact of the childrens' [sic] conception, birth, care and development under circumstances of a spastic, non-communicating, occasionally violent spouse-father is a major factor in the size of the verdict for loss of consortium." *Herold v. Burlington Northern*, Civ. No. A1-80-120, slip op. at 6 (D.N.D. July 23, 1984). The trial court reasoned this was unfairly inflammatory evidence, and also believed that Janet's post-accident bearing of the two children was an intervening cause. *Id.* Accordingly, the court granted the remittitur. Before the second trial, the trial court reconsidered this reasoning and agreed that much of this evidence was admissible. Because the district court decided to permit evidence regarding problems of raising and conceiving the children in the second trial, Janet now reasons the original verdict should be reinstated.

Although the trial court implicitly held that much of the

[2] Although plaintiff alleges error in the second trial, at oral argument counsel waived any possible claim to another new trial based on such alleged error.

evidence it found prejudicial in the first trial should be submitted to the jury in the second trial, the court's reasoning on the remittitur in the first trial focused on the fact that the overall verdict was against the weight of the evidence. The trial court had the opportunity to observe the proceedings and the evidence, and although a trial court should be constrained in overturning a jury verdict the law is clear that such decisions remain within the trial court's discretion. They will not be set aside without some showing of abuse of discretion. Although the trial court recognized that it was mistaken in originally finding that the evidence regarding the birth and care of the children was inadmissible, it nonetheless found that the verdict was still against the weight of the evidence and should not be reinstated. We find the trial court did not abuse its discretion in so ruling. *See Ouachita Nat'l Bank v. Tosco Corp.*, 716 F.2d 485, 488 (8th Cir. 1983) *(en banc)* (while remittitur is appropriate only if the award is so grossly excessive as to shock the conscience of the court, such order will not be disturbed absent an abuse of discretion); *Slatton v. Martin K. Eby Constr. Co.*, 506 F.2d 505, 509 (8th Cir. 1974) (the trial court's determination of a reasonable limit to a jury award must be given considerable deference and will not be overturned absent an abuse of discretion), *cert. denied*, 421 U.S. 931 (1975). Furthermore, the trial court's decision to admit a truncated version of the same evidence in the second trial does not establish an abuse of discretion per se in granting the remittitur. Again, the trial court was there to observe the weight and impact of the overall evidence in the first trial, and we can find no reversible error in the trial court's decision.[3] Accordingly, we affirm.

A true copy.

ATTEST: Clerk, U.S. Court of Appeals, Eighth Circuit

[3]We make our ruling based solely upon the trial court's proper exercise of discretion in granting the remittitur. We do not address any alleged evidentiary issues or errors in the second trial. Counsel merely cites these allegations to emphasize the alleged unfairness of the second trial as a post hoc reason why the first verdict should be reinstated.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

KENNETH A. HEROLD and
JANET HEROLD,
Plaintiffs,
vs.
BURLINGTON NORTHERN, INC.,
a foreign corporation,
Defendant.

CIVIL NO.
A1-80-120

MEMORANDUM and ORDER

This case, claiming negligence, and before this Court by virtue of 28 U.S.C. 1332 (diversity) was tried between November 22 and December 13, 1983.

The injuries complained of were caused by a farm truck, train collision, which occurred as the Heralds drove north out of a sale stock yard and a west bound freight came across the front of the sale yard.

The verdict was as follows:

Kenneth Herold	$9,425,000.00
Janet Herold	
Compensatory damages for personal injuries	$ 250,000.00
Damages for loss of consortium	$2,000,000.00
The fault of Kenneth Herold	20%
The fault of Janet Herold	0%
The fault of Burlington Northern	80%

The Defendant has moved, by brief, for judgment notwithstanding the verdict, if that is denied, for a new trial, or for a remittitur. As was done in *Thornton v. Equifax*, 467 F. Supp. 1008 (E.D. Ark. 1979), *Rev'd on other grounds*, 619 F.2d 700 (8th Cir. 1980), the motions will be considered in the descending order of their dispositive effect.

Counsel have briefed the evidence and the arguments expertly and exhaustively. So instead of reviewing all of the details of those briefs, I shall confine my observations to those factors which dominate the issues.

I. The Motion for Judgment Notwithstanding the Verdict

The appropriate motions were made during the trial (Fed. R. Civ. P. 50) and the motion is properly before me.

The motion for judgment notwithstanding the verdict must be denied unless it can meet the same test applied to motions for directed verdict. That test is found in *Polk v. Ford Motor Co.*, 529 F.2d 259, 267 (8th Cir. 1976):

> In passing upon the motion for judgment, the trial court and this court are (1) to consider the evidence in the light most favorable to the plaintiffs as the parties prevailing with the jury; (2) to assume that all conflicts in the evidence were resolved by the jury in favor of the plaintiffs; (3) to assume as proved all facts which plaintiffs' evidence tends to prove; (4) to give the plaintiffs the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and (5) to deny the motion if, reviewing the evidence in this light, reasonable men could differ as to the conclusion to be drawn from it. *Hanson v. Ford Motor Co.*, 278 F.2d 586, 596 (8th Cir. 1960).

The evidence established that the lead engine was being operated in violation of the Boiler Inspection Act, 45 U.S.C. 23, in that an appurtenance, a rotating beacon, had been removed from its bracket for repair, and the engine oper-

ated, as the lead engine, without it. The railroad knew of the disorganized traffic flow, and the converging street system of the Schnell crossing; and there was evidence by both sides as to whether appropriate warning signals were given. Thus judgment notwithstanding the verdict cannot be given on the basis of lack of evidence of negligence.

There was uncontroverted evidence that Janet was seen looking west. Defendant concludes from that, that she did not look east. And both parties conclude from the fact that Kenneth drove the truck across the tracks at about ten miles per hour, that he looked neither way. Neither conclusion is the only reasonable one, and since Janet has no memory of the accident and Kenneth cannot communicate, no further evidence than that produced is available.

Drawing a reasonably favorable inference, I conclude that the evidence that Janet looked west allowed the jury to infer she was busy looking both ways. And considering the time of day, the size of the sale, and the fact that the sale yard contained parked vehicles, loading and unloading vehicles, crisscrossing men, women and children on foot, the jury could reasonably conclude from the slow speed of the truck that Kenneth was also looking.

These facts, plus the impediments to a clear view of the track at all times, and the existence of approach streets on both sides of the railroad track, force me to conclude that I cannot say no reasonable jury would have found the defendant less than 50% at fault for the accident. So judgment notwithstanding the verdict cannot be granted on that basis.

II. The Motion to Grant a New Trial

The standards for grant of a new trial are:

1. Has there occurred a clear prejudicial error of law?
2. Has there occurred a clear prejudicial error of fact?

3. Was the verdict, while not entirely outside the evidence, contrary to the great weight of the evidence?

Thornton, 467 F. Supp. at 1010.

Despite the arguments presented in the defense brief, I find there has been no clear prejudicial error of law or of fact.

Was the verdict, while not entirely outside the evidence, contrary to the great weight of the evidence? This question will be considered along with the third motion, that for a remittitur.

III. The Motion to Grant a Remittitur

The standard to be applied in considering the motion is:

> Is there no basis on which a reasonably responsible jury could have found that verdict within the framework of the correct law and the admissible evidence?

Thornton, 467 F. Supp. at 1011.

The "verdict" in this case is, of course, the verdict for damages, so now we must evaluate amounts.

Kenneth Herold was found damaged in the sum of $9,425,000.00. Since the jury assessed 20% of the fault against him, his recoverable damages were $9,425,000.00 − 20% or $7,540,000.00. The uncontroverted evidence established that he suffered extended, generalized brain damage; that he had been reduced to a spastic quadrapelegic; that his memory for current activities was largely lost; that his memories of his youthful health, activities and associates was retentive; and that his present mental abilities were low average. Thus we have a reflective, perceptive, interpretive man trapped in a ungovernable, unusable body, with no meaningful ability to escape, even through communication. A more terrible prison is difficult to visualize.

A factor that must be brought into this area of considera-

tion is: Counsel for the defense, at the conclusion of the plaintiffs opening argument, elected to waive argument. Thus the jury heard only the plaintiffs claim that he had suffered injuries in the range of five million to twenty million (Transcript 2183). The jury found nine and one-half million.

That is in the lower half of the requested range.

I conclude that the damage figure is not contrary to the great weight of the evidence, and therefore a basis for a new trial is not established.

The motion for a new trial as to the claim of Kenneth Herold is denied.

Since a reasonably responsible jury could have found the verdict within the framework of the correct law and the admissible evidence, the motion for a remittitur as to the claim of Kenneth Herold is denied.

These decisions to deny the motions for a new trial and a remittitur are equally applicable to the problem of the distribution of fault (80%-20%). Therefore, the motion for a new trial as to Kenneth Herold on that issue is also denied.

Janet Herold was found damaged in the amount of $250,000.00 for personal injuries, and not at fault. She did suffer substantial injury from which she has recovered. As to that finding, applying the standards above recited for determination of motion for a new trial and a remittitur, I conclude the basis for granting relief has not been established, and the motions must be denied.

Janet was also found to be damaged from loss of consortium in the amount of $2,000,000.00. Again, the jury went in to deliberate after hearing an argument for two to two and one-half million, and no argument in opposition to those amounts.

But this verdict of $2,000,000.00 for loss of consortium is subject to some problems.

In his opening argument counsel for the Plaintiff brought in the matter of the birth of two children after the accident as part of the background picture. (Transcript 117-18 and Transcript 118-19.) Her testimony as to the circumstances of their births are set out at Transcript 1260-65. In the closing argument plaintiffs counsel referred to the children at Transcript 2177 with reference to the plaintiffs inability to communicate, and at Transcript 2179 with reference to "[W]hat has Janet lost?"

The facts as to the birth of the children are, briefly, that Janet deliberately caused conception of the son, the eldest, in an attempt to help Kenneth master his frustrations, develop a desire to set a fatherly example, and lead him toward recovery. The conception of the daughter was not planned by her but was a result of her reunion with him during his treatment in a behavior modification program undertaken at Rochester, Minnesota. However, while Janet's conduct was noble and commendable, it was clearly an intervening cause and not a direct result of the accident or injury. So the burdens brought on by Kenneth's inability to function as a spouse-father are not compensable. *Moum v. Maercklein*, 201 N.W.2d 399; *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746; Restatement 2d Torts 441.

I conclude that the drama and the emotional impact of the childrens' conception, birth, care and development under circumstances of a spastic, non-communicating, occasionally violent spouse-father is a major factor in the size of the verdict for loss of consortium. And we must remember that the cost of his care and comfort has been included in the verdict received by him.

I conclude further that the verdict for loss of consortium is contrary to the great weight of the evidence; and that there is no basis on which the jury could have found that

verdict within the framework of the correct law and admissable evidence.

I conclude that a jury using the evidence as to this matter in a reasonable manner would not have found damages for loss of consortium in an amount in excess of $300,000.00.

Therefore an order for a new trial on the issue of damages for loss of consortium will be granted unless the plaintiff, Janet Herold, accepts a remittitur in the amount of $1,700,000.00, leaving an award for loss of consortium in the amount of $300,000.00.

IT IS ORDERED:

1. The motion for judgment notwithstanding the verdict is denied.

2. The motion for a new trial is denied, except:

3. The motion for a new trial on the issue of loss of consortium is granted Burlington Northern, Inc., unless Janet Herold shall accept by executed instrument, filed with the Clerk of the United States District Court within thirty days of the date of this order, a remittitur in the amount of $1,700,000.00, leaving an award for loss of consortium in the amount of $300,000.00.

Dated at Lincoln, Nebraska this 20th day of July, 1984.

Bruce M. Van Sickle, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

KENNETH A. HEROLD and
JANET HEROLD,
Plaintiffs,
vs.
BURLINGTON NORTHERN,
INC., a foreign corporation,
Defendant.

CIVIL NO.
A1-80-120

ORDER

This is a diversity case involving a railroad crossing accident at Dickinson, North Dakota, on November 21, 1974. At the conclusion of a trial completed in December, 1983, a jury found for the Plaintiffs and determined damages for:

A. Kenneth Herold
and
B. Janet Herold including:
1. Compensatory damages for personal injuries,
and
2. Damages for loss of consortium.

This Court gave the Plaintiff, Janet Herold, the option to retry the issue of compensatory damages and Janet Herold accepted that option.

Both litigants have presented motions in limine to restrict or assert certain areas of evidence. This order will respond to both sets of motions.

Plaintiffs' first motion:

As to the issue of disclosing to the jury either the fact that Plaintiffs prevailed in the first trial, or the amounts of damages:

This Court feels that an orderly trial requires disclosure of how the remaining issue of damages for loss of consortium came up. To that end I propose to make the following recital to the jury:

> "This matter arose out of a railroad crossing accident at Dickinson, North Dakota, on November 21, 1974. A jury found for the Plaintiffs on the issues of liability and general damages. There remains unresolved the question of what damages, if any, are due to the Plaintiff, Janet Herold, for the loss of her conjugal fellowship with her husband, and her right to the company, society, cooperation, and aid of her husband in every conjugal relation."[1]

Counsel on both sides are invited to suggest alternate preliminary statements of the case. Such alternate preliminary statements must be filed with the Court at least ten days before trial.

Therefore,

IT IS ORDERED that Plaintiffs' motion that there be no disclosure that the Plaintiffs have received damages is *denied.*

The Defendant has, in turn, moved that it be allowed to disclose the amount of general damages received by Kenneth Herold in the principal verdict. Since the cause of

[1] *See* Black's Law Dictionary, Special Deluxe Fifth Edition, Consortium.

action for loss of consortium is "an independent right, not contingent upon the rights or liabilities of her husband,"[2]

IT IS FURTHER ORDERED that Defendant's motion that it be allowed to disclose the amount of general damages received by Kenneth Herold in the principal verdict is *denied.*

There still remains the issue implied by the Plaintiffs' motion: May the defense show the amount of general damages received by Janet Herold? This Court concludes the correct answer is "No." Any evidence of prior amounts received is bound to come to the jurors' minds if, as in this situation, they must discuss damages. I conclude that such evidence is not relevant, and even if it were relevant, it is so prejudicial as to hamper, not help, the jurors' consideration of the remaining damage issue in this case.[3]

IT IS FURTHER ORDERED that Plaintiffs' motion that Burlington Northern be precluded from introducing evidence, or making any reference to the jury that Janet Herold recovered $250,000.00 for personal injuries is *granted.*

Plaintiffs' second motion is that there be no disclosure that Kenneth Herold was found 20% negligent in the first trial. Since Plaintiffs action is brought to enforce an independent right, the Kenneth Herold judgment is not relevant and should not be admitted into evidence.[4]

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[2]*Herold v. Burlington Northern, Inc.*, 761 F.2d 1241, p. 1249 (8th Cir. 1985).

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[3]Fed. Rules Civ. Proc., 402, 403.

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[4]*Milde v. Leigh*, 28 N.W.2d 530 (N.D. 1947)

IT IS FURTHER ORDERED that the motion there be no disclosure that Kenneth Herold was found 20% negligent is *granted.*

However, by the same reasoning, Plaintiffs may not represent, contrary to that judgment, that Burlington Northern was wholly at fault as to Kenneth Herold's injuries.

Plaintiffs' third motion is that there be no disclosure that Kenneth Herold has received payment from collateral sources. As earlier pointed out, Kenneth Herold's recoveries are not relevant to the issues in this matter, and if disclosed would be prejudicial to the claims of Janet Herold.

IT IS FURTHER ORDERED that Plaintiffs' motion that there be no disclosure that Kenneth Herold has received payment from collateral sources is *granted.*

Plaintiffs' fourth motion is that the Defendant not disclose whether any award received by Janet Herold will be subject to income taxes, and impliedly, that no instruction be given as to that. While it is true the North Dakota Supreme Court has held that such an instruction is improper,[5] the United States Supreme Court held, after the trial of *South v. R.R. Passenger Corp.*, that such an instruction was proper.[6] Despite that holding, since this is a diversity case, this Court must follow the substantive law of North Dakota. And the rule that the instruction as to income taxes shall not be given is part of North Dakota substantive law.[7]

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[5]*South v. R.R. Passenger Corp.*, 290 N.W.2d 819 (N.D. 1980)

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[6]*Norfolk v. W. Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755 (1980). 62 L.Ed.2d 689

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[7]*Losey v. North American Philips Consumer Electronics*, 792 F.2d 58 (6th Cir. 1986)

It has been suggested that since the income tax instruction was given in the original trial,[8] and not tested by the appeal, it has become the law of the case. But since it was not tested on the appeal, it did not become the law of the case by virtue of the appeal.[9] In a narrower sense, and for this trial court it became the law of the case, but this Court is not compelled to perpetuate error, or to refuse to correct itself despite compelling reasons.[10] This Court accepts the rule of *South, supra*, as governing it on the reasoning of *Losey, supra*. The instruction will not be given.

IT IS FURTHER ORDERED that Plaintiffs motion that there be no instruction that an award received by Janet Herold may not be subject to income taxes is *granted*.

Plaintiffs' fifth motion is that Defendant not be allowed to present evidence that Janet Herold does not need the money she might get from her loss of consortium claim. Such testimony is clearly irrelevant and prejudicial.

IT IS FURTHER ORDERED that Plaintiffs' motion that Defendant not be allowed to present evidence that Janet Herold does not need the money is *granted*.

The Defendant has presented four motions in limine, they are:

One, that Plaintiffs not be allowed to present evidence of

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[8]Jury Instruction outside of instruction text, Transcript of trial, page 2188.

> "If in your deliberations you determine that it is proper to determine the amount of damages, you are instructed that any such damage award, if given, is not subject to reduction by income taxes."

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[9]1B Moore's Federal Practice ¶ 0.404[4-3]

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[10]1B Moore's Federal Practice ¶ 0.404[4-1]

Kenneth Herold's pain and suffering and recuperation process. The evidence of Kenneth Herold's pain and suffering is irrelevant to the claim of Janet Herold, and prejudicial to the position of the Defendants. To that extent,

IT IS FURTHER ORDERED the motion is *granted.*

The question of the evidence of Kenneth Herold's recuperative process raises a related matter. In their Brief in Opposition to Burlington Northern's Motion in Limine, Plaintiffs claim that:

> "All of the evidence concerning Ken's injuries and their effect on Janet's life is admissible at the second trial just as it was during the first trial."[11]

Plaintiffs go on to say that all problems can be resolved by instruction. But Plaintiffs paint with too broad a brush.

This conflict between Defendant's wish to hold out even evidence of Kenneth Herold's recuperative process, and Plaintiff's desire to retry the case, had best be met now. Evidence of Kenneth Herold's recuperative development (process) will show the extent of his disability at various stages since his injury. Therefore,

IT IS FURTHER ORDERED that Defendant's motion to hold out evidence of Kenneth Herold's recuperative process is *denied.*

The Court expects and requires both sides to prepare a statement of Kenneth Herold's injuries to be read to the jury.

The Court, if requested, will instruct the jury at some point in the trial that Plaintiff, Janet Herold, may not be compensated for medical expenses, including nursing care

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[11]Plaintiffs' brief in opposition to Burlington Northern's Motion *In Limine*

and supplies furnished by her, for household services furnished by her, for personal care services furnished by her.

Second, Defendant has moved that Plaintiffs not be allowed to furnish evidence of nursing services performed by Janet Herold.

IT IS FURTHER ORDERED this motion is *granted.*

Third, Defendant has moved that Plaintiffs not be allowed to introduce any evidence as to Mark Herold and Amy Herold. This Court has earlier ruled that the decision of Janet Herold to bear Mark Herold and Amy Herold was a matter uniquely in her full control, and was an intervening factor introduced by her after Kenneth Herold had suffered his disabling injury.

However, the concept of loss of consortium includes sexual consortium, and all that that implies.[12] And why accept theoretical evidence of the problems of motherhood under the circumstances Janet Herold faces, when we have the actual problems available to 'the trier of fact? I conclude that we are faced with a circumstance contemplated by Fed. Rules Civ. Proc. 402 and 403, i.e., the evidence is relevant, and therefore admissible unless its probative value is substantially outweighed by the danger of unfair prejudice.

IT IS FURTHER ORDERED the motion that Plaintiffs not be allowed to introduce any evidence as to Mark Herold and Amy Herold is *denied*, and Plaintiffs are requested to present an offer of proof in this area before presenting the specific items of evidence to the jury.

Fourth, Defendant moves for leave to disclose the amounts of the prior verdicts. For the reasons set out in the previous discussion on this matter.

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[12]Blacks Law Dictionary, *supra*

IT IS FURTHER ORDERED that Defendant's motion for leave to disclose the amounts of the prior verdicts is *denied.*

Bismarck, North Dakota, this 21st day of November, 1986.

Bruce M. Van Sickle, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

KENNETH A. HEROLD and
JANET HEROLD,
Plaintiffs,

vs.

BURLINGTON NORTHERN, INC.,
a foreign corporation,
Defendant.

CIVIL NO.

A1-80-120

ORDER

The Plaintiff, Janet Herold, has moved to reinstate her original jury verdict for two million dollars for loss of consortium. She bases the motion on the premise that this Court's decision that evidence regarding the actual problems of raising two children, born after her husband's injury, and as a result of her independent and separate decisions to have the children, could under limiting controls, be admitted in the retrial of loss of consortium.

IT IS ORDERED that Plaintiff's motion is *denied.*

If the decision to allow limited use of the child raising problems is a reversal of positions, that fact does not bother this Court, and it is clearly within the authority of the Court. 1B Moore's Federal Practice ¶ 0.404[4-1].

It is the blessing of the appellate procedure that trial courts, having met an issue as best they can in the course of a trial, can rely on the appellate courts in a quieter, more broadly considering atmosphere, to check their work and assure that no injustice occurs.

As suggested in this Court's order of November 21, 1986, it is not the intention of this Court to allow a complete retrial of all aspects of the birth, raising, and care of the children. These matters are matters highly charged with emotionalism, and yet the factual material involved will be useful for the jury to make a fair decision. This Court realizes that it is going to be presiding over a trial in which able counsel for the Plaintiff will be trying to get everything in, and able counsel for the Defendant will be trying to hold everything out. It is for that very reason that in the Order of November 21, 1986, this Court warned counsel for both sides that:

> "... Plaintiffs are requested to present an offer of proof in this area before presenting the specific items of evidence to the jury."

This Court expects that request to be recognized.

Bismarck, North Dakota this 2nd day of January, 1987.

Bruce M. Van Sickle, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-5076

JANET HEROLD
Appellant,
vs.
BURLINGTON NORTHERN, INC., a foreign corporation,
Appellee.

Appeal from the United States District Court for the District of North Dakota

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

February 2, 1988

Appellee will recover from the appellant the sum of $66.00. "Let the within Mandate be filed and entered on the Clerk's Records."

Dated April 4, 1988.

Bruce M. Van Sickle, Senior Judge
United States District Court

A true copy.

ATTEST: Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

MANDATE ISSUED 3/22/88

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5076-ND

JANET HEROLD Appellant, vs. BURLINGTON NORTHERN, INC., a foreign corporation, Appellee.	*	Appeal from the United States District Court for the District of North Dakota

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

March 15, 1988

Order Entered at the Direction of the Court:
Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit

No. 87-2036

In The

Supreme Court of the United States

October Term, 1988

JANET HEROLD,

Petitioner,

vs.

BURLINGTON NORTHERN, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1988—Executeam Companies, Inc., 93 W. Little Canada Rd., St. Paul, MN 55117-(612) 483-8793/1-800-747-8793

SUPREME COURT RULE 28.1 STATEMENT

At the time of the railroad crossing accident in 1974 which gave rise to these procedings, Respondent was known as Burlington Northern, Inc. Following a corporate reorganization, Respondent became Burlington Northern Railroad Company, and its newly created parent corporation was called Burlington Northern, Inc. Burlington Northern Railroad Company has two affiliates, Burlington Resources, Inc., and Burlington Northern Motor Carriers, Inc. The partially owned subsidiaries of Burlington Northern Railroad Company are:

Burlington Northern Railroad Company:

The Belt Railway Company of Chicago
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
The Denver Union Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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IN THE
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Mrs. Herold has no standing to complain of the order of remittitur issued by the District Court in this case because she

rejected that remittitur. The Petitioner's refusal of the remittitur and decision to have her claim for loss of consortium presented at a second jury trial have the same effect as if the District Court had granted a new trial unconditionally, and therefore Mrs. Herold has no direct and substantial personal interest in changing current remittitur practice.

Even if Mrs. Herold does have standing to raise this issue, she is in error in contending that this Court has never addressed the practice of remittitur in the context of the Seventh Amendment's grant of a right to jury trial. To the contrary, this Court has endorsed remittitur practice in several cases, and that practice is now universally accepted in the federal courts.

A trial court's ability to condition the grant of a new trial on the plaintiff's refusal to accept a remittitur of the jury award promotes efficient judicial administration by avoiding unnecessary jury trials. Moreover, the pracitice of remittitur is an important adjunct to the right to trial by jury, allowing the trial judge to correct jury excesses when they occur.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. MRS. HEROLD REFUSED THE REMITTITUR, AND THUS HAS NO STANDING TO COMPLAIN THAT REMITTITUR IS AN UNCONSTITUTIONAL PRACTICE.

The history of the proceedings below as recounted in Janet Herold's Petition for Writ of Certiorari reveals that in the first trial in December 1983 the jury returned a verdict of $2 million for Mrs. Herold's loss of consortium. Following post-trial motions by the Burlington Northern, the District Court explicitly held that the verdict for loss of consortium was "contrary to the great weight of the evidence." (App. at A9) By implication, in citing improper evidence which influenced the size of the verdict and in ordering a remittitur of 85%, the District Court also held

that the $2 million consortium award was excessive. (App. A9-A10)

To cure these defects, the District Court ordered a new trial on the issue of damages for loss of consortium unless Mrs. Herold accepted a remittitur in the amount of $1.7 million, leaving an award of $300,000. Mrs. Herold refused to accept the remittitur, and at a second jury trial in January 1987 on her claim for loss of consortium, she was awarded $500,000.

In her Petition for Writ of Certiorari, Mrs. Herold argues that the District Court used the remittitur to impose on her its own views of a reasonable damage award, thus violating her constitutional right to trial by jury.[1] This argument might have some surface plausibility if in fact the remittitur had been accepted by Mrs. Herold and she was now complaining that it was an arbitrarily low amount. But Mrs. Herold did *not* accept the remittitur, and thus the constitutionality of remittitur practice is not properly before this Court.

A party has standing to seek review of the judgment of a Court of Appeals if, on such review, this Court has before it an actual controversy in the outcome of which the party has a "direct and substantial personal interest." *Chicago v. Atchison, Topeka & Santa Fe Railway Company*, 357 U.S. 77, 83 (1958). Mrs. Herold has no direct and substantial personal interest in changing current remittitur practice because she cannot show that it has had any adverse impact on her.

The District Court was fully entitled to grant Burlington Northern a new trial outright on the dual grounds that the verdict was against the weight of the evidence and was also excessive. It is beyond peradventure that both of these grounds for new trial are within the scope of Rule 59 of the Federal Rules of Civil Procedure and have deep roots in English common law. 6A *Moore's Federal Practice*, 2d ed., § 59.08[1], pp. 59-80 to 59-81 (1987). *Montgomery Ward and Company v. Duncan*, 311 U.S. 243 (1940). The District Court was not obligated to suggest a remittitur. Yet Mrs. Herold argues that because it did combine

[1]Petition, p. 14.

its grant of a new trial with an order of remittitur--a remittitur which she refused--she has somehow been prejudiced.

Mrs. Herold lacks standing to complain of the remittitur because the remittitur was essentially irrelevant to her present status. It has certainly had no adverse impact on her right to trial by jury. If there had been no remittitur practice as an option available to the District Court, it would most certainly have ordered an unconditional new trial. The right to trial by jury does not mean that the jury verdict is free from supervision by the trial judge. Mrs. Herold's constitutional rights were not violated by virtue of her having to undergo a second trial, her protestations to the contrary notwithstanding.[2]

II. THE PRACTICE OF REMITTITUR HAS BEEN SPECIFICALLY UPHELD IN THE FACE OF CONSTITUTIONAL CHALLENGE.

In her Petition, Mrs. Herold argues that the practice of remittitur has never been subjected to "critical examination" in the context of the Seventh Amendment's command that "no fact tried by a jury shall be otherwise reexamined ... than according to the rules of the common law."[3] Although this Court may not have previously analyzed remittitur in a fact situation identical to this case, it has had many opportunities to respond to attacks on remittitur grounded in the Seventh Amendment. On each such occasion it has confirmed the validity of this practice.

Thus, in *Northern Pacific Railroad Company v. Herbert*, 116 U.S. 642 (1886), the Railroad complained that in reducing Herbert's verdict from $25,000 to $10,000 on remittitur, the trial court had by "necessary implication" found that the "issues in the case had not been tried by such jury as the law contemplates." 116 U.S. at 642. This Court rejected that argument and gave broad approval to the concept of remittitur:

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[2]Petition, pp. 15-16.

[3]Petition, pp. 7-8.

> The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict, was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive, it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could therefore, be properly allowed to stand.

116 U.S. at 646-647.

A similar result was reached three years later in *Arkansas Valley Land and Cattle Company v. Mann*, 130 U.S. 69 (1889). In that case the losing party below contended specifically that to make the grant of a new trial contingent on refusal of remittitur was a violation of the Seventh Amendment because it constituted a reexamination of facts tried by the jury. This Court disagreed, holding that there is no practical distinction between, on the one hand, the trial court's power to set aside a verdict when it finds damages excessive, and on the other hand, its power to determine the extent to which the damages are excessive and offer the plaintiff an opportunity to cure that defect:

> The practice which this court approved in *Northern Pacific Railway Company v. Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot by disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. [Citations omitted] But, in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority

> of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint.

130 U.S. at 74.

The Seventh Amendment was again directly at issue when the Court addressed the constitutionality of the practice of additur in *Dimick v. Schiedt*, 293 U.S. 474 (1935). Finding no precedent for it in English common law, the Court held that additur was in fact violative of the Seventh Amendment. But the Court went on to address the distinction between additur and remittitur and provided a compelling rationale for the practice of remittitur which continues to the present date:

> Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess -- in that sense that it has been found by the jury -- and that the remittitur has the effect of merely lopping off an excrescence.

293 U.S. at 486.

Since the decision in *Dimick*, remittitur has enjoyed "universal" acceptance in the federal courts, and a declaration that it is

unconstitutional would require "a judicial uprooting of precedent akin to that effected by *Erie-Tompkins*." 6A *Moore's Federal Practice*, 2d ed., § 59.08[7], pp. 59-189 to 59-191 (1987). Indeed, more recent pronouncements by this Court and lower federal courts indicate that remittitur is regarded as a settled question. Thus, for example, this Court has stated that if a damage award is excessive, "it is the *duty* of the trial judge to require a remittitur or new trial." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 65-66 (1966) (emphasis added). *See also, Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1042-1043 (5th Cir. 1970); *Mooney v. Henderson Portion Pack Company*, 339 F.2d 64 (6th Cir. 1964).

III. THE PRACTICE OF REMITTITUR CONTRIBUTES TO JUDICIAL ECONOMY AND EFFICIENCY, AND IS A NECESSARY ADJUNCT TO THE RIGHT TO TRIAL BY JURY.

Even if Mrs. Herold had standing to complain of the remittitur ordered by the district Court in this case, and even if the practice of directing a reduction of an excessive jury award as an alternative to a new trial were not supported by a line of legal precedent dating back to *Blunt v. Little*, 3 Mason 102, in 1822, there would be no basis for discarding this practice today. Modern day litigation in the United States is too often an expensive, cumbersome, time-consuming affair which exhausts the patience and the pocketbooks of those who are parties to it. Numerous states have recognized the value of remiititur as a way to avoid unnecessary, repetitive jury trials, and have sanctioned its use by court decision or by statute.[4]

More importantly, Mrs. Herold's readiness to eliminate or substantially modify the practice of remittitur betrays a lack of understanding of the important role played by judges, in cooperation with juries, in the administration of justice. If the

[4]Comment, *Correction of Damage Verdicts by Remittitur and Additur*, 44 Yale Law Journal 318, fn's 2,5 (1934).

practice of remiititur is objectionable, why not also eliminate a judge's ability to unconditionally order a new trial if the damages are excessive? Why permit a judge to grant a new trial if he deems the verdict against the weight of the evidence? The answer is found in the maxim that just as no individual is infallible, so a group of individuals, assembled as a jury, is capable of error. The experience and wisdom of the trial judge, who has had the opportunity to observe the witnesses and sift the evidence, is sometimes an essential counterbalance to the actions of a misguided jury. This fact was recognized by Justice Mitchell of the Pennsylvania Supreme Court in *Smith v. Times Publishing Company*, 36 A. 296 (Pa. 1897):

> The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice, -- a power exercised in pursuance of a sound judicial discretion, without which the jury system would be a capricious and intolerable tyranny, which no people could long endure. This court had occasion more than once recently to say that it was a power the courts ought to exercise unflinchingly.

36 A. at 298. A similar observation was made by Chief Justice Tindal in *Mellin v. Taylor*, 3 BNC 109, 132 Eng. Reports 351:

> I cannot conceive how the benefit of trial by jury can be in any way impaired by a cautious and prudent application of the corrective which is now applied for: On the contrary, I think that, without some power of this nature residing in the breast of the Court, the trial by jury would, in particular cases, be productive of injustice, and the institution itself would suffer in the opinion of the public.

In sum, the right to grant a new trial is "not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Aetna Causalty & Surety Company v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941). The same principle applies to the practice of remittitur. Like the United States Constitution, the effective operation of the American judicial system depends on a system of checks and balances, with citizen juries supervised by jurists trained in the law. Remittitur has been a part of that system for the duration of this country's history, and Petitioner has presented no valid argument for its abandonment.

CONCLUSION

For each of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated this 13th day of July, 1988.

Respectfully submitted,

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No. 87-2036

In The
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October Term, 1988

JANET HEROLD,

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vs.

BURLINGTON NORTHERN, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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July, 1988

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. STANDING.

Respondent, Burlington Northern, Inc. (hereinafter "BN"), argues that Janet Herold does not have "standing" to challenge the constitutional propriety of remittiturs because she refused to accept the 85% remittitur ordered by the District Court. BN contends that Mrs. Herold would have standing if she had accepted the remittitur.[1] On the contrary,

[1]BN asserts that Mrs. Herold's constitutional challenge "might have some surface plausibility if in fact the remittitur had been accepted by Mrs. Herold and she was now complaining that it was an arbitrarily low amount." Opposition Brief, p. 3.

if Mrs. Herold had accepted the remittitur, she would have been precluded from appealing to the Eighth Circuit Court of Appeals and she definitely would not now have standing before this Court. *Donovan v. Pennsylvania Shipping Co., Inc.*, 429 U.S. 648 (1977); *Cunningham v. City of Overland*, 804 F.2d 1066, 1069 (8th Cir. 1986).

Mrs. Herold followed the only procedure available to her for challenging the constitutionality of the remittitur practice. She refused the District Court's 85% remittitur; she attempted to cross-appeal the remittitur order which was held to be interlocutory, *Herold v. Burlington Northern, Inc.*, 761 F.2d 1241, 1249-50 (8th Cir. 1985); she underwent the time, expense and uncertainty of a sanitized second trial; she then appealed the propriety of the original remittitur; and, she is now requesting this Court to critically examine an admittedly widespread practice which is the very antithesis of the right to trial by jury. Under these circumstances, the BN cannot in good conscience argue that Mrs. Herold does not have a "direct and substantial personal interest" in the issue before the court or that the practice of remittitur has not had an "adverse impact" on her interests.

II. PRIOR REMITTITUR DECISIONS.

The BN fails to recognize that this Court's prior remittitur decisions have not specifically addressed the constitutionality of remittiturs in a factual context such as that presented in this case. In both *Northern Pacific Railroad Company v. Herbert*, 116 U.S. 642 (1886) and *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889), the plaintiff agreed to accept remittitur and the *defendant* appealed, alleging that the remittitur practice violated a defendant's constitutional right to trial by jury. This Court, however, held that a defendant has no "cause for complaint"[2] in such a situation because it is the plaintiff who is being forced to relinquish all or part of a favorable jury verdict.

[2] *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 74 (1889).

Thus, the court did not sanction the remittitur practice when used against a complaining plaintiff and, in fact, reserved determination of that issue for another day.[3]

Since *Mann*, it does not appear that this Court has specifically answered or addressed the question left to be determined in that case. Although remittitur practice has enjoyed almost "universal" acceptance in the courts, such passive acceptance of a doctrine which "has been condemned as opposed to the principles of the common law by every *reasoned* English decision"[4] certainly does not make it constitutional. If such were the case, this country would still be governed by the doctrine of "separate but equal."[5]

III. THE PRACTICE OF REMITTITUR ACTUALLY FRUSTRATES JUDICIAL ECONOMY.

BN contends that the practice of remittitur constitutes a valuable way of avoiding "expensive, cumbersome [and] time-consuming" litigation and "unnecessary [and] repetitive jury trials."[6] If that is the case, then it is indeed ironic that because of the practice of remittitur, Janet Herold was forced to relinquish a jury verdict which was admittedly based upon

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[3]Mr. Justice Harlan implicitly acknowledged a distinction between remittiturs when applied to defendants as opposed to plaintiffs when he wrote:

> Under what circumstances, if any, a party who is compelled to remit a part of the verdict, in order to prevent a new trial, can complain before this court, we need not decide in the present case.

Id. at 73.

[4]*Dimick v. Schiedt*, 293 U.S. 474, 484 (1935) (emphasis in original).

[5]*Plessy v. Ferguson*, 163 U.S. 537 (1896).

[6]Opposition Brief, p. 7.

admissible evidence and the correct law;[7] she was forced to spend nearly two years attempting to have it reinstated in the Court of Appeals; she was forced to go through an expensive, time-consuming and wholly unnecessary second trial two years later;[8] and, then she had to spend another year before the Court of Appeals.

The practice of remittitur thus contributes to "judicial economy and efficiency" *only* if a plaintiff such as Mrs. Herold is willing to sacrifice her right to trial by jury for the sake of judicial expediency. If she elects to defend and protect the constitutional right of trial by jury, she is penalized, punished and beaten down by the system. It is little wonder then that rather than promoting judicial economy, the practice of remittitur actually contributes to the public perception that the judicial system is unresponsive to the public and that, as the public's representatives in the system, juries are all too often bypassed.

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[7]BN argues that the remittitur practice is an "essential counterbalance" to the actions of a "misguided" jury. Opposition Brief, p. 8. In this case, it is admitted that the original jury was properly instructed on the applicable law; that it heard only relevant, admissible and useful evidence; that BN waived final argument to the jury; and, that BN did not object to any of the evidence on the issue of loss of consortium. The use of the remittitur practice in such a case where the jury was anything but "misguided" speaks volumes as to its unconstitutionality.

[8]The second trial resulted in a $500,000 verdict whereas the District Court's remittitur would have awarded $300,000. To force a litigant to undergo a second trial in order to correct a district court's unexamined "guess" as to how a properly "guided" jury would decide the case is not a very good example of judicial economy.

CONCLUSION

The Petition for Writ of Certiorari should be granted so that the important constitutional question presented can finally and completely be examined and determined by this Court.

DATED this 22nd day of July, 1988.

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